IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

APPEAL NO.565 OF 1995
IN
WRIT PETITION NO.2560 OF 1992

Shri Chandrakant K. Patil,
Pantpradhan Prakalp, Near
Poonam Nagar, Building No.16,
Room No.13, 2nd floor, Andheri,
Bombay 400 093. .. Appellant
(Orig. Petitioner)

v/s.

1. Union of India, (through
the Counsel for Union of India.

2. Bombay Port Trust, having
its office at Ballard Estate,
Surji Vallabhdas Marg,
Bombay 400 038.

3. The Deputy Chairman,
Bombay Port Trust,
Surji Vallabhdas Marg,
Bombay 400 038.

4. The Docks Manager,
Bombay Port Trust, having
his office at
Surji Vallabhdas Marg,
Bombay 400 038. .. Respondents
(Orig. Respondents)

Mr.K.P.Anilkumar for appellant.

Mr.P. Ramaswamy i/by M/s. Mulla & Mulla for respondent No.2.

CORAM : R.M.LODHA AND
J.P.DEVADHAR, JJ.

DATED : 22nd September, 2004

ORAL JUDGMENT (Per R.M.Lodha, J.)

Heard.

2. The appellant before us is the employee who has

been dismissed from service by order dated 23rd July, 1990 after holding the domestic enquiry against him. The order of dismissal was challenged by the employee before the appellate authority. The employee was informed about the dismissal of the appeal by communication dated 18th February, 1991. The employee challenged the order of dismissal as well as the order of the appellate authority by filing writ petition before this court. The learned single Judge by the judgment dated 4th April, 1995 dismissed the writ petition. Aggrieved thereby, the employee has come in appeal.

3. The employee was employed as a watchman by the Bombay Port Trust in the year 1982. He had a night duty on 8th May, 1987 that commenced from 11.30 p.m. and ended on 9th May, 1987 at 9.30 a.m. The incident of theft took place during that time when the employee was on duty as watchman. The details of incident of theft as reflected from the domestic enquiry are that the employee was posted as watchman at Frere Basin Gate alongwith one P.S. Tanwade. R.B. Worlikar- another employee was posted as watchman at Wadi Bunder in the same shift. All the three were found involved in the theft of BPT property. The police constable Shelke on duty in the morning on 9th May, 1987 saw all the three persons and became suspicious of their movements. R.B. Worlikar and P.S. Tanwade had

two handbags in their possession. The said bags contained machinery parts belonging to Bombay Port Trust. The employee requested the police constable Shelke not to take action against R.B. Worlikar and P.S. Tanwade. The police constable Shelke, however, lodged the complaint at the Yellow Gate Police Station since he found the property of Bombay Port Trust having been stolen. Besides that all the three employees were chargesheeted in disciplinary proceedings. Interalia, the charge against the appellant was that P.S. Tanwade and R.B. Worlikar attempted to remove unauthorisedly 19 pieces of machinery parts out of the Frere Basin Gate during the third shift of 9.5.1987 and the said attempt was made in the presence of the appellant who was posted as watchman and he failed to prevent commission of the said unauthorised removal. Before the enquiry officer, oral as well as documentary evidence was led by the employer. In defence, the appellant (delinquent) examined himself and also produced some material. The enquiry officer, after recording the evidence, concluded that there was ample evidence, oral and documentary, against the delinquent who failed to prevent R.B. Worlikar and P.S. Tanwade from committing theft in his presence and removing the property of the Bombay Port Trust. The enquiry officer forwarded his report to the disciplinary authority. By notice dated 27th March, 1989, the

delinquent was called upon to show cause why the findings of the enquiry officer be not accepted and proposed penalty of dismissal should not be imposed upon him. The delinquent responded to the show cause notice and filed his reply on 29th April, 1989. The disciplinary authority, however, was satisfied that in the enquiry proceedings the charge was proved against the delinquent that he failed to prevent the theft being committed of the properties of the Bombay Port Trust in his presence. The delinquent was found unfit to continue in the B.P.T. security organisation and accordingly, the service of the delinquent was dismissed. As already noticed above, the appeal preferred by the delinquent was dismissed by the appellate authority and the writ petition has also been dismissed by the learned single Judge.

4. The learned counsel for the appellant first of all contended that the chargesheet was not precise as it did not disclose any charge that is listed in Bombay Port Trust Employees (Classification, Control and Appeal) Regulations, 1976 (for short 'the Regulations').

5. We asked the learned counsel for the petitioner as to whether this point was urged before the learned single Judge. He read the entire order passed by the learned single Judge and then

admitted that the said point was not advanced before the learned single Judge. This contention, therefore, cannot be allowed to be raised for the first time in appeal. Besides that we find that the delinquent was well aware of the charge levelled against him and from the perusal of the regulations and the charges imputed against the delinquent we find with the chargesheet does disclose the charges that are listed in the Regulations.

6. The learned counsel for the appellant then contended that the finding of the enquiry officer that the charge No.1 is proved against the delinquent that he failed to prevent the theft of the Bombay Port Trust property being committed in his presence is based on no evidence. This contention need not detain us much as we find from the impugned judgment that no such contention was raised before the learned single Judge. In any case, having read the enquiry report, we find that there is ample evidence available on record to prove that the delinquent failed to prevent the theft of Bombay Public Trust property which has been committed in his presence. Even the circumstances speaks for themselves. The delinquent was at the relevant time posted as watchman at the site. He was found in the company of two other watchmen who committed theft of the

Bombay Public Trust property. The delinquent requested the police constable Shelke, who found that Bombay Public Trust property has been stolen, not to take action against the other two watchmen P.S. Tanwade and R.B. Worlikar. P.S. Tanwade ran away with the stolen property in the presence of the delinquent. All these facts are clearly established by the evidence led before the enquiry officer. In the circumstances, therefore, it cannot be said that the finding of the enquiry officer that the delinquent failed to prevent R.B. Worlikar and P.S. Tanwade from committing theft in the presence of the delinquent cannot be said to be without any evidence.

7. The learned counsel contended that the learned single Judge having accepted the legal proposition that even if the charges may not be identical but if the foundation of both the enquiries is similar, then the acquittal in the criminal case may warrant dropping of the disciplinary enquiry or setting aside the order of dismissal, the learned single Judge ought to have set aside the order of dismissal. The contention is devoid of any substance. In the light of the judgment of the Supreme Court in the case of Corporation of the City of Nagpur, Civil Lines, Nagpur and anr. v. Ramchandra G. Modak, AIR 1984 SC 636, the learned single Judge noticed the legal position that even

if the charges may not be identical but if the foundation of both the enquiries is similar then the acquittal in the criminal case may warrant dropping of the enquiry of setting aside the order of dismissal. The learned single Judge observed that ultimately it depends on facts of each case. In so far as present case is concerned, the learned single Judge has not recorded any finding that the foundation of the criminal case as well as the domestic enquiry was same. Rather, on consideration of the charge in the criminal case and the charge that was levelled against the delinquent in the domestic enquiry, the learned single Judge found, and in our view rightly, that in the domestic enquiry the delinquent was charged mainly for failing to prevent unauthorised removal of machinery by R.B. Worlikar and P.S. Tanwade while in the criminal case, the delinquent was charged for having committed theft in respect of Bombay Port Trust machinery. The charge with which the delinquent was faced in the criminal case is materially distinct and different from the charge that was levelled against the delinquent in the domestic enquiry. The acquittal of the delinquent in the criminal case, therefore, could not have been by itself the ground for setting aside the dismissal order, particularly in a case like this where the charge in the criminal case and the charge in the domestic enquiry were entirely

different and on the basis of the evidence on record, the charge in the domestic enquiry was well established.

8. The learned counsel criticised the judgment of the learned single Judge by inviting our attention to the observation in the impugned judgment that in the disciplinary enquiry, the enquiry officer was right in placing reliance on the statement before the vigilance officer which has not been retracted by the petitioner. The learned counsel submitted that the said observation of the learned single Judge is erroneous and in any case, the retracted confession could not have been relied upon. The learned counsel in this connection relied upon the judgments of the Supreme Court in the cases of Sm.Kalawati and anr. v. The State of Himachal Pradesh, AIR 1953 SC 131, Shankaria v. State of Rajasthan, AIR 1978 SC 1248 and Balwant Kaur v. Union Territory of Chandigarh, AIR 1988 SC 139.

9. The judgments relied upon by the learned counsel have no relevance to the facts and circumstances of the present case. There was sufficient material before the enquiry officer other than the statement made before the vigilance officer to prove that the delinquent was fully aware of the machinery being removed from the premises of the Bombay Port Trust by R.B.Worlikar

and P.S.Tanwade. The enquiry officer has considered the entire evidence on record and in our considered view, the finding of the enquiry officer in not vitiated by any legal infirmity

10. The learned counsel then contended before us that the disciplinary authority as well as the appellate authority failed to give due weightage to the findings of the criminal court whereby the delinquent was acquitted honourably in the criminal case. We are not impressed by the submission of the learned counsel. For what we have observed above that the charge faced by the delinquent in the criminal case was materially distinct and different from the charge in the domestic enquiry, the question of due weightage to the findings of the criminal court, as a matter of law, did not arise. On the basis of the evidence led before the enquiry officer in the domestic enquiry, the enquiry officer found that the charge against the delinquent that he failed to prevent R.B. Worlikar and P.S.Tanwade committing theft of the Bombay Public Trust property being committed was proved. The disciplinary authority accepted the said finding and, therefore, the order of dismissal cannot be faulted. Incidentally, we may notice that the finding recorded by the enquiry officer is antecedent to the judgment of acquittal by the criminal court. The appellate authority did notice

that the delinquent's acquittal in the criminal proceeding has no bar on the departmental proceeding as in the present case the nature of the charges and the degree of the evidence of two proceedings are not the same.

11. The learned counsel for the delinquent lastly contended that the appellate authority failed to consider the delinquent's appeal as pr the provisions of Regulation 26(2) of Regulations 1976. This argument, we are afraid, was made by the learned counsel in desperation. We find that the appellate authority cannot be faulted for having not disposed of the appeal as per Regulation 26(2).

12. The appeal, accordingly, fails and is dismissed with no order as to costs.

(R.M.LODHA, J.)

(J.P. DEVADHAR, J.)